BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below.

The opinion of the District Court (R. p. 451) is not reported.

The opinion of the Court of Appeals (R. p. 518) is reported in 151 F. 2d 374.

Jurisdiction.

The date of the judgment is July 16, 1943. The statute under which jurisdiction is invoked is Section 240 (a) Judicial Code (28 U.S.C.A. Sec. 347 (a)), as amended. Cases believed to sustain the jurisdiction are: *De Forest Radio Company v. General Electric Company,* 283 U.S. 664, 51 S.Ct. 563, 75 L.Ed. 1339; *American Fruit Growers, Inc. v. Brogdex Co.,* 283 U.S. 1, 51 S.Ct. 328, 75 L.Ed. 801; *Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp. et al.,* 294 U.S. 477, 55 S.Ct. 455, 79 L.Ed. 1005; and *Muncie Gear Works, Inc. et al. v. Outboard Marine & Mfg. Co. et al.,* 315 U.S. 759, 62 S.Ct. 865, 86 L.Ed. 1171.

Statement.

The facts so far as this application is concerned are sufficiently stated in the petition.

Specification of Errors.

The error which petitioner will urge if the Writ of Certiorari is granted is that the Circuit Court of Appeals for the Seventh Circuit erred in interpreting Section 4915 R.S. to mean that the District Court must have jurisdiction of all of the indispensable parties to the action

within six (6) months after the decision of the Board of Appeals.

Summary of Argument

I. The decision of the Circuit Court of Appeals is in conflict with the provisions of Sec. 4915 R.S.

II. The decision of the Seventh Circuit Court of Appeals conflicts with the holdings of other Circuit Courts of Appeals and of this Court on similar statutes of limitations.

III. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, decided by this Court.

IV. The importance of this case to American agriculture affords reason for the exercise of this Court's discretion to grant the Writ of Certiorari.

ARGUMENT

I. **The decision of the Circuit Court of Appeals is in conflict with the provisions of Sec. 4915 R.S.**

Sec. 4915 R.S. (35 U.S.C.A. Sec. 63), so far as here pertinent, reads as follows:

Sec. 4915 requires that bill in equity be filed within 6 months of Board's decision.

> "*Bill in Equity to Obtain Patent.* Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this sec-

> tion, may have remedy by bill in equity, if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law . . ."

The question in this case turns upon the interpretation of that portion of the statute which states that the applicant "may have remedy by bill in equity if filed within six (6) months after such refusal or decision; and the Court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge . . ."

Section 4915 was enacted in 1870. The statement of this Court in *Case v. Los Angeles Lumber Products Company,* 308 U.S. 106, 115; 60 S.Ct. 1, 7; 84 L.Ed. 110, furnishes a guide to the interpretation of Sec. 4915. "Where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. Keck v. United States, 172 U.S. 434, 446, 19 S.Ct. 254, 258, 43 L.Ed. 505."

It would therefore be well to consider the meaning given to the phrase "bill in equity" at the time this section was enacted.

Bill in equity is equivalent to complaint.

The filing of a bill in equity as called for by Sec. 4915 is exactly equivalent to the filing of a complaint in a common law action.

Rule 3, Federal Rules of Civil Procedure, reads as follows:

> *"Commencement of Action.* A civil action is commenced by filing a complaint with the Court."

In Edmunds' Federal Rules of Civil Procedure (1938) appears the following annotation, note 4 to Rule 3:

> *"Rule grounded in equity procedure.* Former Federal Equity Rule 12 provided that whenever a bill was filed, and not before, the clerk should issue the process. This was in accordance with settled principles of equity practice, and the corresponding method prescribed by above Rule for commencing suit is the classic way of initiating suits in equity. Thus, in Daniell's Chancery Pleading and Practice (6th Am.Ed.), 2, it is said: 'A suit on the equity side of a court of chancery, on behalf of a subject, is ordinarily commenced by preparing a petition, containing a statement of the plaintiff's case, and praying the relief which he considers himself entitled to receive.'
>
> "In Farmers' Loan & Trust Co. v. Lake Street Elev. R. Co., 177 U.S. 51, 44 L.Ed. 667, 20 S.Ct. 564 (1900), the court said, citing Story's Equity Pleading: 'A suit in equity is commenced by filing a bill of complaint.' In Humane Bit Co. v. Barnet (C.C. N.J. 1902), 117 Fed. 316, it was stated that, in England, suits in equity have always been instituted by preferring a bill in the style of a petition, directed to the lord chancellor or other proper person, it being provided by statute that no process shall issue until after the suit has been so begun, and that in the United States the filing of the bill is the commencement of the suit . . ."

Note 7 to Rule 3, idem, in part, reads as follows:

Filing the complaint does not confer jurisdiction upon the court.

"*7. Filing does not confer jurisdiction.* Will merely filing the complaint confer jurisdiction upon the court, irrespective of the issuance and service of process? In dealing with equity cases the federal courts have heretofore indicated to the contrary.

" . . . In Wheeler v. Walton & Whann Co. (C.C. Del. 1895), 65 Fed. 720, the court said: 'Service of process is always requisite and until the subpoena has been served on the defendant, jurisdiction is not complete, either of the parties or of the property.'

* * *

"And in Equitable Life Ins. Ass. Soc. v. Schwartz, (C.C.A. 5th, 1930), 42 F. (2d) 646, the court said: 'A suit in equity is commenced when the bill is filed and process is issued where the process is subsequently served'."

District Court need not have acquired jurisdiction within 6 months.

Hence it will be seen that Sec. 4915 does not intend that the Court shall have acquired jurisdiction over the parties or the cause of action within the six (6) months period, but only that the complaint in the action must have been filed within that time.

The petitioner respectfully submits that the Court of Appeals therefore erred in interpreting Sec. 4915 to mean that all of the indispensable parties to an action under that Section must have been brought *within the jurisdiction* of the Court within six (6) months of the decision of the Board of Patent Appeals upon the interference.

II. **In overlooking the fact that the action in this case had been commenced within the statutory period, the opinion of the Circuit Court in the case at bar comes**

into direct conflict with a long line of decisions of other Circuit Courts of Appeals on similar statutes of limitations.

Other Circuit Courts of Appeals have held that a statute of limitations is tolled if complaint is filed within time limit.

In the interests of brevity only a few of these, most nearly parallel to the situation here presented, are cited below.

Port v. Litolff, 103 F. 2d 302 was an action for personal injuries under the Merchant Marine Act of 1920, which provides that "no action shall be maintained under this chapter unless *commenced* within two years from the day the cause of action accrued." (Emphasis supplied.) The complaint was filed on the last day of the period of limitations. The defendant was not served *until three (3) days later.* In holding that the action had not been barred, the court said (p. 303):

> "We have heretofore held that where a suit is filed, in good faith, within the period of limitation, it is commenced on the day of filing, if service is made within a reasonable time thereafter. Equitable Life Assur. Soc. v. Schwartz, 5 Cir., 42 F. 2d 646; U.S. v. Adams, 5 Cir., 92 F. 2d 395."

The Circuit Court of Appeals for the Ninth Circuit went even farther in its holding in *United Verde Extension Mining Co. v. Koso,* 273 F. 369. The complaint contained two counts, one based on the Employers' Liability Law of Arizona, the other upon the Common Law of that state. Defendants entered demurrers. A few days before trial, *after the limitation period had run,* plaintiff elected, by order of the court, to proceed under the Employers' Liability Act, and dismissed the other cause of action. Defendant took exception to this. In holding that the action had not been barred by the two (2) year

limitation of the Employers' Liability Act, the Court said (P. 374):

> ". . . As the cause of action in the present instance accrued in December, 1917, and trial was not had until March, 1920, we are asked to hold that the limitation of the statute has been rendered ineffectual.
>
> "We cannot agree with that position. Plaintiff below, having commenced his action within two (2) years after the cause accrued, ought not to be denied a right to proceed with it merely because the court delayed ruling upon the demurrers or failed to make an order of election until more than two years passed after the accrual."

In *Armstrong Cork Co. v. Merchants' Refrigerating Co.,* 184 F. 199, the Circuit Court of Appeals for the Eighth Circuit set forth the rule as to suits in equity (P. 206):

> ". . . In the federal courts . . . *the modern and the wiser rule now prevails that a suit in equity is commenced by the filing of the bill with the bona fide intention to prosecute the suit diligently,* provided there is no detrimental or unreasonable delay in the issue or the service of the subpoena. Farmers' Loan & Trust Co. v. Lake Street R.R. Co., 177 U.S. 51, 60, 20 S.Ct. 564, 44 L.Ed. 667; Humane Bit Co. v. Barnet (C.C.) 117 Fed. 316." (Emphasis supplied.)

This Court holds that plaintiff may amend complaint materially after limitation period.

The full scope of the rule that filing the complaint within the prescribed time will toll the statute is indicated by *Missouri, Kansas and Texas Railroad Company v. Wulf,* 226 U.S. 570, 33 S.Ct. 135, 57 L.Ed. 355, where this Court held that *even after the statute of limitation had run* the complaint might be amended to permit the plaintiff to sue in a new capacity and under a new statute.

The plaintiff had commenced the action under a Kansas statute to recover damages for the death of her son occurring while the latter was in the defendant's employ. She filed the complaint originally in her individual capacity as next of kin to the deceased. Later she was appointed administratrix of his estate. *More than two (2) years after the son's death* she amended her complaint to sue in the capacity of administratrix as well as in her original capacity, and also to bring the action under the Federal Employers' Liability Act. The Federal Statute barred such actions after two (2) years from the date of death. This Court, in holding that the action could still be maintained under the amended complaint, said (33 S.Ct. at 137):

> "Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Par. 6 of the employers' liability act. The change was in form rather than in substance (Stewart v. Baltimore & O. R. Co., 168 U.S. 445, 42 L.Ed. 537, 18 S.Ct. Rep. 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore, it related back to the beginning of the suit. Texas & P.R. Co. v. Cox, 145 U.S. 593, 603, 36 L.Ed. 829, 832, 12 Sup. Ct. Rep. 905; Atlantic & P.R. Co. v. Laird, 164 U.S. 393, 395, 41 L.Ed. 485, 486, 17 Sup. Ct. Rep. 120. See also McDonald v. Nebraska, 41 C.C.A. 278, 101 Fed. 171, 177, 178; Patillo v. Allen-West Commission Co., 65 C.C.A. 508, 131 Fed. 680; Reardon v. Balaklala Consol. Copper Co. 193 Fed. 189."

It is therefore clear that the Circuit Court was in error when it held, in this case, that Tower must have been made a defendant to the action, so as to bring him within the jurisdiction of the District Court, within the six (6) months period provided by Sec. 4915, and that failure to do so was fatal to the petitioner's suit.

III. **The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, decided by this Court.**

In its opinion, the Court said (R. p. 529):

> ". . . Tower was denied the right after he had been made a party to answer the original complaint and consequently was deprived of a trial in a cause to which he was an indispensable party."

The question of due process of law, which is incident to a determination of the main question in this case, has been decided against the petitioner in the above quoted language.

Does the denial of Tower's motion deprive him of due process of law? There seems to be no case decided in the Federal Courts which is squarely in point upon this issue. It is believed, however, that recourse to certain well settled principles will resolve the question in petitioner's favor.

"Due process" defined.

Due process of law has been defined by this court in *Pennoyer v. Neff*, 95 U.S. 714, 744, 24 L.Ed. 565, 572, as:

> ". . . A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

Applying the tests provided by this definition of Due Process of Law to the facts in this case, there has been:

There has been a competent tribunal.

(1) A competent tribunal, namely the District Court, empowered to hear causes of this nature by Sec. 4915.

Tower's general appearance gave District Court jurisdiction over him.

(2) The defendant Tower has been brought before the Court by his voluntary appearance. In making a general appearance without pleading to the jurisdiction of the court over his person, Tower waived the question of jurisdiction under Rule 12(h) of the Federal Rules of Civil Procedure, which states that "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . ." (with certain exceptions not here pertinent.)

In *Maxwell v. Stewart,* 89 U.S. 77, 80; 22 Wall. 77, 80; 22 L.Ed. 564, 565, this Court said:

> "The record shows that the action was commenced by attachment and service had by publication. So far the action was in the nature of a proceeding *in rem,* and would bind only the property attached. But afterwards, as the record also shows, *the defendant voluntarily appeared and submitted himself to the jurisdiction of the court.* He at first filed a demurrer, then an answer, and finally went to trial upon the issues made by the pleadings. After judgment he moved for a new trial which was overruled. If these statements appearing in the record are true, the court did have jurisdiction of the person of the defendant, and could bind him by a judgment." (Emphasis supplied.)

Tower was properly before the Court, since he voluntarily submitted to its jurisdiction.

Tower has had a full trial on the merits.

(3) The third test laid down by *Pennoyer v. Neff* is that there must have been a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In its findings upon Tower's motion to file an answer to the original complaint, the District Court said (R. p. 467):

> "An examination of said proposed answer demonstrates that said defendant Tower desires to have a trial not only upon the issues heretofore passed on by the court, but also various other issues which the said Tower could have raised at the trial in behalf of his client, Roach, but which he failed to do."

While there seems to be no Federal case which expressly supports this position in an exactly parallel situation, the rule is well established that a judgment upon the merits in *one* suit is conclusive upon the parties and their privies in *another* suit as to all matters and defenses which were, or might have been raised in the first action. *Gould v. Evansville & Crawfordsville Railroad Co.,* 91 U.S. 526, 23 L.Ed. 416; *Grubb v. Public Utilities Commission of Ohio et al.,* 281 U.S. 470, 479; 50 S.Ct. 374, 378; 74 L.Ed. 972.

A fortiori, the defenses which Tower, as attorney for the defendant Roach, raised in the proceedings in the District Court, as well as those which he waived, must be binding upon him, since he stood in a relation of privity to Roach.

The petitioner respectfully submits, therefore, that as to Tower all of the requirements of due process of law have been met by the proceedings in this case.

IV. **The importance of this case to large numbers of farmers and to the entire electric fence industry affords reason for the exercise of this Court's discretion to grant the Writ of Certiorari.**

A vital farm industry is threatened with an invalid patent.

The farm industry now finds itself confronted with an invalid patent. Manufacturers, purchasers and users of the Klumb equipment have no protection against a host of infringement suits brought by Roach, Tower and their assignees, although the District Court has found that Klumb's prior invention would constitute a valid defense to every such action. Nevertheless, every defendant in such a suit would have to apprise himself of the existence and priority of Klumb's invention and be prepared to go to a lengthy trial on the merits, duplicating the proceedings already had in the District Court in this case. That the possibility of such a procedure is no idle threat appears from the fact that less than a dozen of the defendant Roach's controllers had been manufactured and sold between the time the device was developed, in 1936, and the date on which the injunction issued from the District Court, in July, 1943 (R. p. 225, 253), while the plaintiff Klumb's device is being manufactured and extensively sold, both nationally through Montgomery Ward & Co. and internationally through other agencies.

Some idea of the magnitude of the industry may be gained from figures released in 1942 by the Electric Fence Manufacturer's Association, 615 North Aberdeen Street, Chicago, Illinois. In 1940, alone, the latest year for which figures are available, 240,000 fence controllers were sold, and the industry marketed controllers and "such accessory items as are manufactured exclusively for electric fencing, valued at $3,800,000."

The situation is thus parallel to that presented by *De Forest Radio Company v. General Electric Company*, 283 U.S. 664, 51 S.Ct. 563, 75 L.Ed. 1339; *American Fruit Growers, Inc. v. Brogdex Co.*, 283 U.S. 1, 51 S.Ct. 328, 75 L.Ed. 801; *Altoona Publix Theaters, Inc. v. American Tri-Ergon Corp. et al.*, 294 U.S. 477, 55 S.Ct. 455, 79 L.Ed. 1005 in which this court granted Writs of Certiorari to review cases in which the sole questions were factual ones as to the validity of patents.

With the exception of one fairly large concern, the greatest portion of the electric fence manufacturing industry is located in the Seventh Circuit. The situation here is therefore similar to that in *Muncie Gear Works, Inc., et al. v. Outboard Marine & Mfg. Co. et al.*, 315 U.S. 759, 62 S.Ct. 865, 86 L.Ed. 1171, where the sole question on the appeal to this Court concerned the validity of patent claims to an anti-cavitation plate used on relatively large and fast outboard motors. The claims were alleged to be invalid because there had been public use and sale of the device more than two years before the idea was presented to the Patent Office. In stating its reason for granting the Writ of Certiorari this Court said (62 S.Ct. at 868, 315 U.S. at 765):

> "While there was no conflict of decision with respect to these claims, we granted certiorari in view of the questions presented and because the patent dominates a substantial portion of an industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decisions, is unlikely. 314 U.S. 594, 62 S.Ct. 100, 86 L.Ed.—, Schriber Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 59 S.Ct. 8, 83 L.Ed. 34."

The Petitioner respectfully submits that the subject matter involved in this action cannot reasonably be con-

sidered as of lesser importance than a device used on speed boats; nor is the situation less critical to the industry than that in the *Muncie* case.

CONCLUSION

This is such a case as merits the consideration of this Court. It is urged that a Writ of Certiorari issue herein.

Respectfully submitted,

IRA MILTON JONES
Counsel for Petitioner
STANLEY G. KLUMB

Milwaukee, Wisconsin
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